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Supreme Court of the United States

OCTOBER TERM, 1944

No. **436**

BOLIVIAN INTERNATIONAL MINING CORPORATION,

Petitioner,

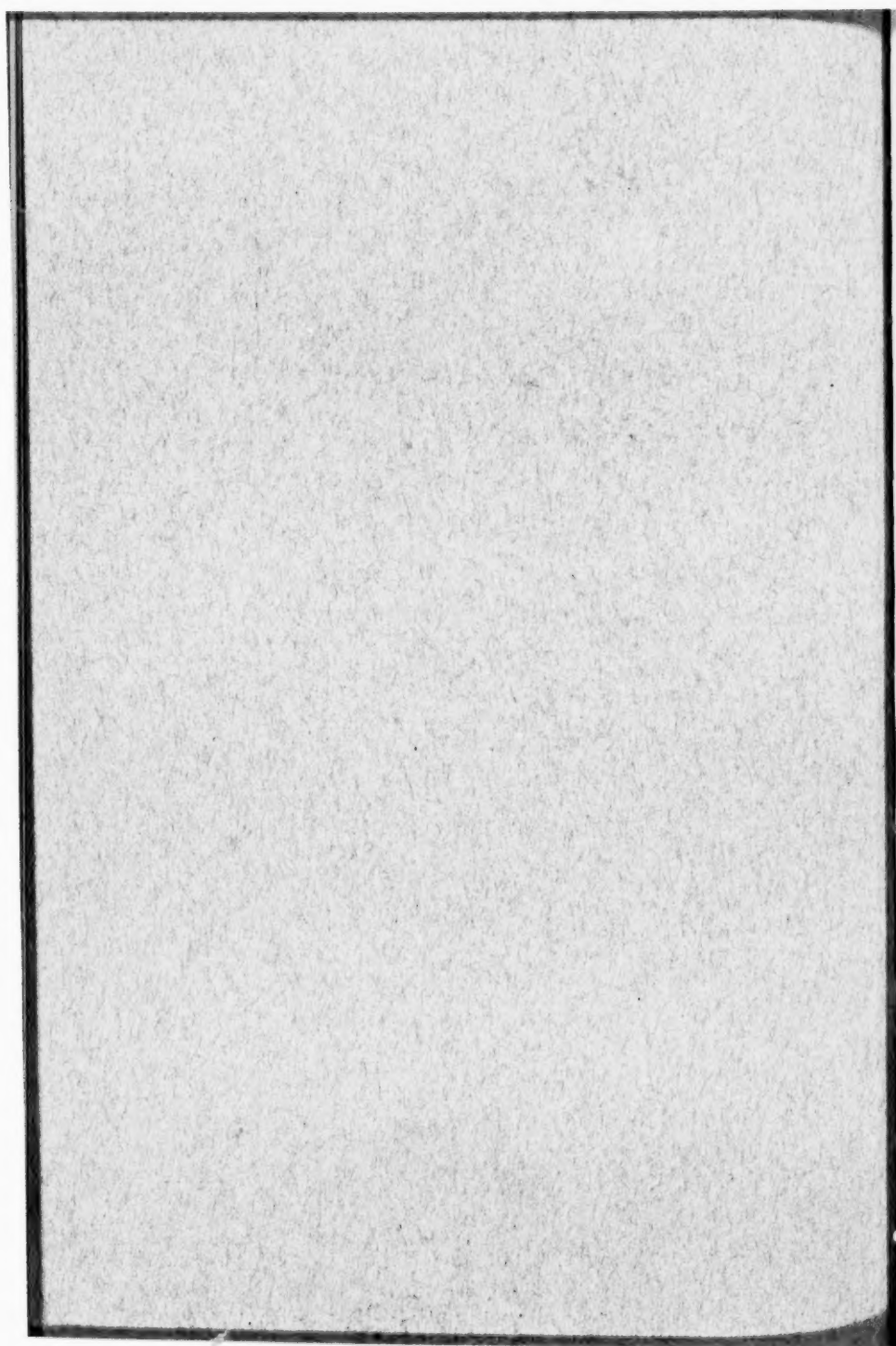
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
SECOND CIRCUIT AND BRIEF THEREON**

**HUBERT E. ROGERS,
JOHN F. CONDON, JR.,**
Solicitors for Petitioner.



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No.

BOLIVIAN INTERNATIONAL MINING CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of BOLIVIAN INTERNATIONAL MINING CORPORATION respectfully shows to this Honorable Court:

Summary and Statement of the Matter Involved

Petitioner, Bolivian International Mining Corporation, prays that a writ of certiorari issue to review the determination of the United States Circuit Court of Appeals for the Second Circuit, entered the 22nd day of May, 1944, affirming a decree of the Tax Court of the United States. The order for mandate of the Circuit Court of Appeals was filed June 7, 1944. A certified transcript of the record of the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in compliance with the rules of this Court.

Petitioner instituted a proceeding against the Commissioner of Internal Revenue in the Tax Court of the United States for a redetermination of a surtax assessed by the Commissioner on alleged undistributed profits for the year 1936 in the amount of \$10,378.34, and for 1937 in the amount of \$2,558.42.

Petitioner claimed a credit for the taxable years 1936 and 1937 in computing its tax under Section 14 of the Revenue Act of 1936 entitled "Surtax on Undistributed Profits" under Section 26(e) of the Revenue Act of 1936, on account of a written contract executed by the corporation prior to May 1, 1936 restricting the payment of dividends. The Commissioner disallowed these claimed credits and asserted deficiencies in each of said years.

Subsequent to Commissioner's determination and to the filing of the petition before the Board of Tax Appeals, but prior to trial, the Revenue Act of 1942 was enacted. Section 501 of the Revenue Act of 1942 amended Section 26 of the Revenue Act of 1936 by adding thereto a subdivision (f), entitled "Deficit Credit", making available to certain taxpayers an additional credit against surtax on undistributed profits imposed by Section 14 of the Revenue Act of 1936. The 1942 amendment of Section 26 of the Revenue Act of 1936 was made retroactive to the date of the enactment of the Revenue Act of 1936, and taxpayers affected thereby were given one year within which to file claims for refund or credit.

Prior to the trial before the Tax Court petitioner claimed a credit with respect to the year 1936 under the provisions of said Section 26(f). Respondent disallowed such credit. Petitioner then was granted leave by the Tax Court of the United States to amend its petition so as to include therein a claim for credit under Section 26(f) of the Revenue Act of 1936, as amended by the Revenue Act of 1942.

The Tax Court of the United States found against your petitioner and in favor of the Commissioner on May 18, 1943, which decision is reported in 1 T. C. 1110, the findings

of fact and opinion being included in the record (R. 303-324). Your petitioner appealed to the United States Circuit Court of Appeals from the decision entered under said opinion. The Circuit Court of Appeals affirmed the decision of the Tax Court. The decision was entered without opinion on May 22, 1944 and is reported in 142 F. (2d) 556 and is included in the certified transcript of the record at page 136.

Petitioner is a Delaware corporation resulting from the statutory merger of two Delaware corporations effected in December, 1935. The Delaware corporations were petitioner, Bolivian International Mining Corporation (hereinafter sometimes referred to as "BIMC"), the continuing corporation, and Boltin, Inc. (hereinafter sometimes referred to as "Boltin" (fols. 103-141).

The status of the corporations involved in the statutory merger prior to the merger in December, 1935 was as follows:

Boltin was a Delaware corporation with shares issued as follows:

Irving W. Bonbright.....	354
O. B. Perry.....	354
George A. Easley.....	185.8
A. G. Dibbs, as nominee for Hubert E. Rogers.....	106.2
Total.....	<u>1,000.0</u>

BIMC, petitioner herein, prior to the merger in December, 1935, was a Delaware corporation, all the stock of which was held by Boltin, Inc.

In 1935, prior to the merger, Boltin was indebted to three of its four stockholders in the aggregate amount of \$1,002,938, represented by notes as follows:

Bonbright	\$454,162.92
Perry	454,162.92
Easley	94,612.16
	(fols. 305, 306)

Rogers, one of the stockholders, never owned any notes of Boltin, and, because of the conflict of interest between Rogers on one side and Bonbright, Perry and Easley on the other, the renegotiations of the Plan of Merger of BIMC and Boltin were deadlocked during 1934 and the latter part of 1935.

The controversy between Rogers on the one side and Bonbright, Perry and Easley on the other arose when Rogers objected to any merger plan which would require the paying off of the note indebtedness owing to Bonbright, Perry and Easley before the payment of any dividends to stockholders (fol. 307). After negotiations of more than a year, the differences between the parties were reconciled and accord on the Plan was reached in October, 1935 (fols. 308-309), as follows:

On October 14, 1935, Bonbright in Rogers' presence wrote to Perry in San Francisco as follows (fols. 308-311; Exhibit S-A, set forth in full fols. 94-101):

"My dear Perry:

This morning I am in receipt of your letter of the 10th October; also, of a letter from Rogers in which he accepts, without qualification, the proposed compromise conditions named in my letter to him of the 11th October, a copy of which was sent to you by air mail on that day, together with the original of his letter to me of the 10th October.

* * * * *

Under the plan as now agreed to, subject to your approval, funds of the Company as made available through the setting aside of depletion reserve, etc., to the extent of \$150,000. per year, will be used toward retirement of the new notes: interest at the rate of $3\frac{1}{2}$ percent. per annum on said notes will then be paid, and, if additional funds are available, twelve cents per share per annum will be declared in dividends on the approximately 160,000 shares of B. I. M. C. stock. Any funds available in any year, after provision of the items named above, to go toward the further retirement of the notes.

You are correct in your assumption as to what I meant in my letter to Mr. Rogers about 'elimination of any stock not required for immediate purposes of the merger.' There will be no stock beyond what is required to satisfy the proposed deliveries to Boltin shareholders and the amount required to be held in the treasury for possible conversion of notes.

Before this letter reaches you, you will doubtless have received the correspondence above referred to, namely, Mr. Rogers' letter of October 10th, and copy of my reply of October 11th. And I hope after reading those letters and this one, you will have a clear picture in your mind.

To make sure that all of our minds have met with regard to the points I have covered in this letter, I am sending a copy to Mr. Rogers, and one to Mr. Armitage and if you do not hear to the contrary by wire, you will know that all here are in agreement. And, in that case, I will be glad to have you wire your approval in order that Mr. Armitage may proceed without further delay, in the preparation of the final papers.

With kindest regards,

Yours very truly,

IRVING W. BONBRIGHT."

In response to the letter of October 14, 1935, Perry wired Bonbright on October 16, 1935, as follows:

"YOUR LETTER OCTOBER FOURTEENTH REGARDING BOLTIN BIMCO MERGER STOP I APPROVE PLAN TO WHICH YOUR LETTER REFERS"

The only other person interested in the Plan of Merger was Mr. Easley, a noteholder and stockholder who personally attended a great many of these discussions and conferences (fol. 346) and who ultimately was one of the signers of Agreement of Merger and Consolidation, Petitioner's Exhibit S-C (fol. 126).

In other words, upon receipt of the telegram of approval from Perry, Bonbright, Easley and Rogers, the holders of all of the stock of Boltin, and Bonbright, Perry and Easley, the holders of all of the note indebtedness of

Boltin, had agreed on the Plan of Merger of BIMC and Boltin. The merger had been held up for more than a year because of the refusal of Rogers to a restriction prohibiting the payment of any dividends by the continuing corporation, BIMC, petitioner herein, until the note indebtedness owing to Bonbright, Perry and Easley had been liquidated.

The Plan as set forth in the letter from Bonbright to Perry of October 14, 1935 (fols. 308-311) provided in brief as follows:

(1) \$150,000 per year was to be set aside out of depletion reserve to be used toward the retirement of the new notes.

(2) Interest at the rate of 3% per annum on the said notes was then required to be paid.

(3) If additional funds were available, 12¢ per share per annum was to be declared in dividends on the BIMC stock.

(4) Any funds available in any year after provision for the items named above were to go toward the further retirement of the notes.

This agreement was entered into at arms' length, after negotiations extending more than a year between the four persons concerned, who were in complete control of petitioner and Boltin. Bonbright, Perry, Easley and Rogers, through stock ownership, controlled Boltin, which owned all the stock of BIMC. Bonbright, Perry and Easley held all the outstanding note indebtedness of Boltin, which indebtedness was to be assumed by BIMC in the merger.

Pursuant to resolutions and corporate action, the Agreement of Merger, Exhibit S-C (fols. 103-141), was executed and filed in the State of Delaware. It is interesting to note that in various capacities Messrs. Bonbright, Perry, Easley and Rogers signed the Merger Agreement, and that the Merger Agreement provided that Bonbright, Rogers, Easley and Perry were to be directors of the merged corporation (fol. 113), and that Bonbright was to be president.

There are two paragraphs of the Merger Agreement (fol. 114) of particular significance: paragraph Sixth, which provides that all franchises, rights, privileges, powers and property of Boltin shall be merged and vested in BIMC, the continuing corporation, and paragraph Seventh, which states that

"All rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired, and all debts, liabilities and duties of Boltin, Inc., shall thenceforward attach to said Bolivian International Mining Corporation, the continuing corporation, and may be enforced against it to the same extent as if the said debts, liabilities and duties had been incurred or contracted by it."

The first time after the merger that the question of paying a dividend arose was at the directors' meeting on August 4, 1936, at which meeting (fol. 315) the following resolution was adopted:

"RESOLVED: That in accordance with the terms of the agreement of merger and consolidation of Boltin, Inc. and Bolivian International Mining Corporation, the escrow agreement dated the 10th day of March, 1936, and the stockholders' agreement of October 14, 1935, that a dividend of 12¢ per share be paid on this Corporation's outstanding shares of stock * * * and that the officers of the Corporation be and they hereby are directed to pay such dividend on the 21st day of August, 1936 to the registered holders of the shares of the Corporation as of the 19th day of August 1936."

Dividends of 12¢ per share for 1936 aggregated \$19,224.72. Dividends of 12¢ per share were declared in the year 1937, aggregating \$22,860 (fol. 88). Whenever dividends have been declared since the year 1937 the dividends in any one year have been 12¢ per share.

During the year 1936 petitioner redeemed outstanding notes in the amount of \$103,838, and during the year 1937 petitioner redeemed outstanding notes of \$299,100 (fol. 316).

On January 1, 1936, taxpayer had a deficit in earnings and profits of \$55,305.77 (fol. 92). For the year 1936 taxpayer's adjusted net income was \$75,946.41. In 1936 earnings and profits as adjusted in respondent's deficiency notice amounted to \$87,984.01 (fol. 317).

In its income tax return for the year 1936 petitioner claimed a credit in the amount of \$41,223.30 under Section 26(c) of the Revenue Act of 1936.

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari applied for rests upon Title 28 of the United States Code Annotated, Section 347.

Questions Involved

FIRST: For the years 1936 and 1937, in computing the tax imposed by Section 14 of the Revenue Act of 1936 (Undistributed Profits Tax), is petitioner entitled to a credit under Section 26(c) (1) of that Act, on account of a written contract executed prior to May 1, 1936, restricting the payment of dividends?

SECOND: For the years 1936 and 1937, in computing the tax imposed by Section 14 of the Revenue Act of 1936 (Undistributed Profits Tax), is petitioner entitled to a deficit credit under Section 26(f) of that Act as amended by Section 501 of the Revenue Act of 1942 equal to the amount by which the adjusted net income exceeds the sum of

(1) Earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year; and

(2) Earnings and profits for the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year)?

Reasons Relied On for Allowance of the Writ

(1) The Circuit Court of Appeals erred in affirming the finding of the Tax Court of the United States that for the years 1936 and 1937 petitioner was not entitled to a credit under Section 26(c)(1) of the Revenue Act of 1936 on account of a written contract restricting the payment of dividends.

(2) The Circuit Court of Appeals erred in affirming the decision of the Tax Court of the United States construing Section 26(f) of the Revenue Act of 1936 as amended to the effect that deficit credit within the meaning of that statute cannot mean any amount less than zero and "deals only with positive earnings and profits" (fol. 322).

(3) The Circuit Court of Appeals erred in affirming the decision of the Tax Court of the United States to the effect that petitioner was not entitled to a credit under Section 26(f) of the Revenue Act of 1936 as amended, even though the Commissioner of Internal Revenue stipulated that petitioner had a deficit (fol. 92).

(4) The questions herein involved are of general importance to all taxpayers and present questions relating to the substance of tax statutes of the United States.

(5) The decision of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Automotive Parts Company v. Commissioner*, 134 F. (2d) 420, and the decision in the Second Circuit in *van Ameringen-Haebler, Inc. v. Commissioner*, 132 F. (2d) 855.

(6) The decision of the Circuit Court of Appeals appears to have been predicated largely upon the decisions of the Supreme Court of the United States in *Dobson v. Commissioner*, 320 U. S. 489, 64 SCT 239, 247, 88 L. Ed. 179,

and *Commissioner v. Heininger*, 320 U. S. 467, 64 SCT 249, 254, 88 L. Ed. 197, to the general effect that the Circuit Court of Appeals should not review a decision of the Tax Court of the United States on a question of fact; the construction by the United States Circuit Court of Appeals of the effect of said decisions deprives petitioner of a review of a decision on a question of law by the Tax Court of the United States to which it is justly entitled.

(7) The decision of the Circuit Court of Appeals affirming a decision of the Tax Court and the determination of the Commissioner in asserting a tax against petitioner because of failure to distribute income during the years 1936 and 1937 is erroneous and is unconstitutional because the asserted tax is not an income tax, but a tax upon capital, and as such has not been apportioned among the several states as required by Article I, Section 2, of the Constitution, which requires that all direct taxes shall be apportioned according to population.

WHEREFORE, your petitioner prays the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in this case, there entitled, *Bolivian International Mining Corporation, Petitioner, v. Commissioner of Internal Revenue, Respondent*, No. 218, October Term 1943, that said cause may be reviewed and determined by this court, and that the judgment of the said Circuit Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as to this court may seem meet and proper.

BOLIVIAN INTERNATIONAL MINING CORPORATION,
HUBERT E. ROGERS,
JOHN F. CONDON, JR.,
Solicitors for Petitioner.

